

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DAVID ESTON HARDIN,

Defendant-Appellant.

UNPUBLISHED

November 19, 2002

No. 235545

Oakland County Court

LC No. 2000-174454-FH

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of attempted first-degree home invasion, MCL 750.110a(2)(A). We affirm.

I

This case arises from the August 2000 attempted break-in of the condominium of an elderly woman, who was an acquaintance of defendant and a friend of defendant's former stepmother. The woman lived in the same housing complex as defendant's half-brother. In the early evening, the complaining witness heard someone knocking on her basement window, which is enclosed by a five-foot window well. She went to the basement and saw a man pounding on the window. A witness reported seeing defendant in the area with a screwdriver in his hand. Defendant admitted knocking on the complaining witness' basement window after she did not answer her door, but indicated that he thought she might be in the basement, and he was looking for his brother and thought she might know where he was. He also admitted having a screwdriver, which he stated he had because his brother's gate sticks.

II

Defendant claims that he was denied the effective assistance of counsel in two respects. First, counsel failed to investigate and bring to light exculpatory evidence concerning the complaining witness' desire to drop the charges against defendant, her doubt about his guilt, and her denial of any statement to police that she saw defendant with a screwdriver in his hand. Second, counsel failed to pursue explanatory evidence that defendant hurriedly left the housing complex to avoid police because he owed back child support. We find no error requiring reversal.

To establish ineffective assistance of counsel, defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant must overcome a strong presumption that counsel's action constituted sound trial strategy. *Id.* at 302.

Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and defendant has failed to show otherwise. As defendant notes, at defendant's preliminary examination, the complaining witness expressed her concerns about dropping the charges; thus, counsel was likely fully aware of this potential evidence. Given the complaining witness's close relationship with members of defendant's family, her desire to drop the charges was understandable and unlikely to be of great import.¹ Likewise, under these circumstances, her testimony that she made no statement to police about defendant having a screwdriver would not be of great import, particularly given another witness' testimony and defendant's admission that he had a screwdriver. Counsel's failure to pursue this evidence must be considered a matter of trial strategy.

Similarly, counsel's failure to present evidence that defendant owed back child support and had failed to appear for a show cause hearing must be viewed as a matter of trial strategy. Any value of this evidence to substantiate defendant's reason for fleeing the police may have been, in the view of counsel, outweighed by its potentially damaging effect on defendant's case.

Further, none of the alleged errors were sufficiently serious to establish the requisite prejudice, i.e., a reasonable probability that the result would have been different and that the trial was fundamentally unfair or unreliable. *People v Pickens*, 446 Mich 298, 312, n 12; 521 NW2d 797 (1994); *Toma*, *supra* at 302-303. We find no error requiring reversal.

III

Defendant also claims that the trial court erred in denying his motion for a *Ginther*² hearing. We disagree.

Defendant asserts that the record is incomplete concerning whether counsel ever interviewed the complaining witness about her attempt to drop the charges and her doubts about defendant's guilt. Further, the court precluded defendant from establishing a record concerning counsel's explanations for the alleged errors.

¹ In fact, during the preliminary examination, the complaining witness explained that one reason she wanted to drop the charges was that she knew defendant's family and she was "sad about the whole thing." Further, despite her later misgivings, there was ample evidence that she was visibly upset by the incident at the time it occurred, to the extent that she was too nervous to telephone 911 and so her friend, defendant's former stepmother, with whom she was speaking on the telephone, called 911 for her and assisted her with her complaint to the police.

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

The absence of an evidentiary hearing is not fatal to a defendant's claim of ineffective assistance of counsel where the details of the alleged deficiencies are sufficiently contained in the record to permit this Court to reach and decide the issue. *People v Johnson*, 144 Mich App 125, 129; 373 NW2d 263 (1985). In this instance, the alleged errors are apparent from the record, and the record is sufficient for review; thus, the court did not err in denying defendant's request for an evidentiary hearing.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald